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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS:

2003 JUL 30 P 4: 04

MARC SPITZER, Chairman
JIM IRVIN
WILLIAM A. MUNDELL
JEFF MATCH-MILLER
MIKE GLEASON

AZ CORP COMMISSION
DOCUMENT CONTROL

In the matter of:

DOCKET NO. S-03539A-03-0000

YUCATAN RESORTS, INC., d/b/a
YUCATAN RESORTS, S.A.,
3222 Mishawaka Avenue
South Bend, IN 46615;
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South Bend, IN 46680;
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Cancun, Q. Roo
Mexico C.P. 77500

RESPONDENT MICHAEL E. KELLY'S
(1) REPLY IN SUPPORT OF THE
MOTION TO DISMISS FOR LACK OF
PERSONAL JURISDICTION AND
INSUFFICIENCY OF SERVICE OF
PROCESS AND (2) JOINDER IN THE
REPLY FILED BY RESPONDENTS
YUCATAN RESORTS, INC. AND
RESORT HOLDINGS
INTERNATIONAL INC.

RESORT HOLDINGS INTERNATIONAL,
INC. d/b/a
RESORT HOLDINGS INTERNATIONAL,
S.A.,
3222 Mishawaka Avenue
South Bend, IN 46615;
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WORLD PHANTASY TOURS, INC.
a/k/a MAJESTY TRAVEL
a/k/a VIAJES MAJESTY
Calle Eusebio A. Morales
Edificio Atlantida, P Baja
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MICHAEL E. KELLY and LORI KELLY,
husband and wife,
3222 Mishawaka Avenue
South Bend, IN 46615;
P. O. Box 2661
South Bend, IN 46680;

Respondents.

Arizona Corporation Commission

DOCKETED

JUL 30 2003

DOCKETED BY

PR

Respondent Michael E. Kelly ("Mr. Kelly"), by and through undersigned counsel, hereby submits his Reply in Support of the Motion to Dismiss for Lack of Personal Jurisdiction and Insufficiency of Service of Process and hereby joins the Reply filed on behalf of Yucatan Resorts Inc. This Reply is fully supported by the following Memorandum of Points and Authorities and the entire record before the Commission.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

This matter arises out of the sale of time shares, known as Universal Leases, for vacation resorts in Mexico and Panama. The Division has named Mr. Kelly as a Respondent, along with the following entities: Resort Holdings International, Inc. ("RHI, Inc."), Resort Holdings International, S.A. ("RHI, S.A.") Yucatan Resorts, Inc. ("Yucatan Inc."), and Yucatan Resorts, S.A. ("Yucatan S.A.") (hereinafter, collectively, the "Respondent Entities"). World Phantasy Tours, Inc. is also a named Respondent. Mr. Kelly has moved the Commission to dismiss him from this matter for lack of personal jurisdiction and for insufficiency of service of process.¹

The gravamen of the Division's personal jurisdiction argument is that Mr. Kelly "controls and oversees" certain of the Respondent entities who offered or sold Universal Leases in Arizona. [Temporary Order to Cease & Desist ("C&D") at ¶ 5, Response to Motion to Dismiss at pgs. 6-8.] The Division claims that, through these entities, Mr. Kelly has (1) purposely availed "himself" of the privilege of conducting business in Arizona; and (2) he has engaged in efforts to offer and sell "investment contracts" in form of timeshares in Arizona. [Response at pgs. 7-8.]

As demonstrated below, the Division continues to struggle with the relationships amongst

¹ Mrs. Kelly and Yucatan Resorts Inc. have also filed Motions to Dismiss for lack of personal jurisdiction, both of which are incorporated herein by this reference.

1 the various Respondent Entities and clearly does not understand the Universal Lease program at
2 all. Further, the Division refuses to acknowledge that Mr. Kelly is simply the developer of the
3 various time share resorts. He did not personally "offer or sell" any Universal Lease in Arizona
4 and he did not "oversee or control" any entity that did. And, he did not have any other contacts
5 with Arizona, personal or otherwise, that would convey jurisdiction.²

6 With regard to service of the C&D, Mr. Kelly is a resident of Mexico and the Arizona
7 Administrative Code ("A.A.C.") provides specific rules for service of process in foreign countries.
8 See A.A.C. R14-4-303(F). The Division, however, ignored those rules and, instead, attempted to,
9 and failed to, effectuate "personal service" on Mr. Kelly in Indiana, at the offices of Respondent
10 RHI Inc.

11 In its Response, the Division claims it properly effectuated service through "substituted"
12 means. [Response at p. 4.] However, there is no record that the Commission approved the use of
13 alternative or substitute service. *See* Ariz. R. Civ. P. 4.1(m). The Division also argues that the
14 substitute service was adequate because it was reasonably calculated to give Mr. Kelly actual
15 notice of the proceedings. However, without proper service, the Commission does not have
16 jurisdiction over Mr. Kelly as a matter of law.

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19 **II. THE COMMISSION CANNOT EXERCISE PERSONAL JURISDICTION OVER**
20 **MR. KELLY.**

21 **A. Mr. Kelly Did Not Oversee Or Control Any Entity That Offered Or Sold**
22 **Universal Leases in Arizona.**

23 The Division already has before it a number of pleadings, Motions and Declarations that
24 fully explain the relationship between, and amongst, the various Respondent Entities and

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26 ² Even assuming arguendo that Mr. Kelly is a principal of one or more of the Respondent Entities, it is highly unusual,
27 and unnecessary, for a principal to be named in a Commission proceeding. For instance, the principals of Merrill Lynch, Prudential or other brokerage firms are not haled before the Commission when a proceeding is initiated against the firm. It should not be any different here.

1 Mr. Kelly. Nonetheless, the Division continues to refer to the various Respondent Entities
2 interchangeably and continues to ignore that Mr. Kelly did not "control" the entities that actually
3 sold the Universal Leases.

4 Once again, to clarify:

5 **Respondent RHI Inc.** Respondent RHI Inc. is a Nevada corporation that was formed on
6 July 16, 1999. [Michael Kelly Declaration, hereinafter "Kelly Dec.", at ¶ 6, attached to Motion to
7 Dismiss and incorporated herein.] RHI Inc.'s sole office and principal place of business is in
8 Indiana. [*Id.*] *Respondent RHI Inc. does not offer or sell Universal Leases, nor does it employ any*
9 *individual who offers or sells Universal Leases.* [*Id.* at ¶ 7.] It is merely a processing center.
10 Mr. Kelly is the President of RHI Inc., but Mr. Kelly does not oversee its day-to-day operation, nor
11 does he even have an office at the facility. [*Id.* at ¶ 8.]

12 **Respondent RHI S.A.** RHI S.A. is a Panamanian corporation, with its principal place of
13 business in the country of Panama at the P.H. Cort Building – Primer Piso, Panama City, Panama.
14 [*Id.* at ¶ 9.] RHI S.A. is the sales company that actually sells the Universal Leases. [*Id.* a ¶ 10.]
15 RHI S.A. is registered in Arizona to sell timeshares units, Registration Number DM01-27605.
16 [*Id.*] *Mr. Kelly is not, and never has been, an officer, director or employee of RHI S.A.* [*Id.* at ¶ 9.]
17 In addition, Mr. Kelly is not involved in recruiting or supervising any independent contractors,
18 referred to as sales agents, related to RHI S.A. [*Id.* at ¶ 10.]

19 **Respondent Yucatan Inc.** Respondent Yucatan Inc. is an Indiana corporation, with its
20 sole office and principal place of business located in Indiana. [*Id.* at ¶ 11.] Respondent Yucatan
21 Inc. ceased operation in or around April 2002. [*Id.* at ¶ 12.] *Respondent Yucatan Inc. did not offer*
22 *or sell Universal Leases, nor did it employ any individual who offered or sold Universal Leases.*
23 [*Id.* at ¶ 13.] It was merely a processing center. Mr. Kelly was the President of Yucatan Inc., but
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Mr. Kelly did not oversee its day-to-day operation, nor did he have an office at the facility. [*Id.* at ¶ 11.]

Respondent Yucatan S.A. Respondent Yucatan S.A. was a Panamanian corporation, with its principal place of business in Panama. [*Id.* at ¶ 15.] *Respondent Yucatan S.A. ceased operation in April of 2002.* Like Respondent RHI SA, Respondent Yucatan S.A. was the sales company that actually sold the Universal Leases. [*Id.* at ¶ 16.] Mr. Kelly, however, was not an officer, director or employee of Respondent Yucatan S.A. Additionally, Mr. Kelly was not involved in recruiting or supervising any of Yucatan Resorts, S.A.'s independent contractor sales agents. [*Id.*, ¶16.]

To summarize, there are two incorporated companies, RHI Inc. and Yucatan Inc. These are American companies, wholly independent of one another. There are also two "S.A.s." The "S.A.s" are Panamanian companies, subject to Panamanian law.

It was the "S.A.s" that offered and sold the Universal Leases in Arizona, not the "Inc.s." This is a critical distinction because Mr. Kelly is not, and never has been, an officer, director or employee of either "S.A.," and he does not otherwise "control" or "oversee" these entities. [*Id.* at ¶¶ 9 and 15.]³

B. There Is No Basis For Personal Jurisdiction Over Mr. Kelly, Mr. Kelly Did Not Purposefully "Avail" Himself Of The Privilege Of Conducting Business In Arizona, The Division's C&D Does Not Arise Out Of Any Conduct By Mr. Kelly, And To Exercise Personal Jurisdiction Over Kelly Would Be Unreasonable.

A state may assert either "general" or "specific" jurisdiction over a non-resident defendant, depending on the nature and the extent of contacts between that non-resident respondent and the

³ In its Response, the Division has identified certain corporate filings that suggest that Mr. Kelly is the officer and sole shareholder of Yucatan Investments, S.A. de C.V. [Response at Exhibit 5.] The Division also identifies certain documents relating to Yucatan Resorts S.A. de C.V. [Response at Exhibit 7.] The designation "S.A. de C.V." indicates that these are Mexican corporations. These entities are entirely unrelated to the Panamanian "S.A.s" and are not Respondents in this proceeding. Predictably, the Division has confused the "S.A. de C.V.s" with the "S.A.s."

forum. *See Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414-15 (1984). Although it is not entirely clear from the Division's Response, it appears that the Division has conceded that the Commission does not have "general" jurisdiction over Mr. Kelly and has focused solely on the requirements for "specific jurisdiction." [Response at pgs. 6-8.]

As to specific jurisdiction, an Arizona tribunal may exercise specific jurisdiction over a non-resident respondent only if (1) the respondent "purposefully avails" himself of the privilege of conducting business in the forum; (2) the claim arises out of or relates to the respondent's contacts with Arizona; and (3) the exercise of personal jurisdiction over the non-resident respondent is reasonable under the circumstances. *See Williams v. Lakeview Co.*, 199 Ariz. 1, 3, 13 P.3d 280, 282 (2000) (citing *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 381 (9th Cir. 1990)). (emphasis added).

There is also a critical distinction between jurisdiction over a corporation and jurisdiction over the corporation's non-resident officers and directors (its "controlling persons"). *See Calder v. Jones*, 465 U.S. 783, 790 (1984). Even if a tribunal can establish jurisdiction over a corporation, it still must establish an independent basis for personal jurisdiction over its controlling persons. *See Id.* In particular, the tribunal must show that the controlling person directed or actively participated in the conduct at issue and the conduct must have been purposefully directed toward the forum state. *See Id.*; *Seagate Technology v. A.J. Kogyo Co.*, 219 Cal.App.3d 696, 701-704 (1990). (emphasis added).

1. **Mr. Kelly did not purposely avail himself of the privilege of conducting business in Arizona.**

In the Response, the Division relies on various "Exhibits" that purportedly "demonstrate [Mr. Kelly's] actions directed towards Arizona." [Response at p.6, Exhibits 1 through 4.] Notably, each of these Exhibits are corporate documents and/or filings for Respondent RHI Inc.

1 While these documents may evidence "contact" with Arizona, the contact is between RHI Inc. and
2 Arizona, not Mr. Kelly and Arizona. Indeed, to the extent Mr. Kelly has executed or is referenced
3 in any of these documents, it is solely in his capacity as an officer or director of RHI Inc. And,
4 even if these documents provide a basis for jurisdiction over RHI Inc., that alone is insufficient to
5 establish jurisdiction over Mr. Kelly. *See Seagate Technology*, 219 Cal.App.3d at 701-704 (1990).

6 **2. Mr. Kelly did not personally direct or actively participate in the**
7 **sale of Universal Leases in Arizona.**

8 The requisite minimum contacts for specific jurisdiction exist only if Kelly "purposefully
9 created contacts" with Arizona, or "purposefully directed [his] activities at Arizona residents." *See*
10 *Batton v. Tennessee Farmers Mut. Ins. Co.*, 153 Ariz. 268, 270, 736 P.2d 2, 4 (1987); *see also*
11 *Calder*, 465 U.S. at 790; *Seagate Technology*, 219 Cal.App.3d at 701-704 (1990). (To have
12 jurisdiction the "controlling" person must have directed or actively participated in the conduct at
13 issue and the conduct must have been purposefully directed toward the forum state).

14 Here, Mr. Kelly's sworn Declaration establishes that (i) Kelly is not a "controlling person"
15 of the S.A.s, (ii) he did not recruit or supervise any of the S.A.'s independent contractor sales
16 agents, and (iii) Kelly was never involved in any Universal Lease/timeshare unit offers or sales
17 that occurred in Arizona – personally or through the S.A.s. Consequently, the Division's blanket
18 allegation that Mr. Kelly "oversees and controls" certain Respondent Entities is facially wrong,
19 and cannot support the exercise of specific personal jurisdiction over Mr. Kelly. *See Alexander v.*
20 *Circus Circus Enters., Inc.*, 972 F.2d 261, 262 (9th Cir. 1992) ("for purposes of personal
21 jurisdiction, 'we may not assume the truth of allegations in a pleading which are contradicted by
22 affidavit'") (citation omitted).⁴

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26 ⁴ The Division also alleges that the Universal Lease qualifies as an "investment contract" because the participants
27 could hire Respondent World Fantasy Tours to re-lease the time share for a 9 to 11 percent annual return. [Response
to Respondent Entities Motion to Dismiss at pgs. 8-9.] The Respondents dispute this characterization of the Universal

3. **The exercise of jurisdiction over Kelly would be unreasonable and unfair.**

The final step in any jurisdictional inquiry is for the Division to show that the exercise of personal jurisdiction over the non-resident defendant does “not offend ‘traditional notions of fair play and substantial justice,’” *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982) (citing *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)), or in other words, that it would not be “unreasonable and unfair.” *Asahi*, 480 U.S. at 116. “[T]he weaker the plaintiff’s showing on [minimum contacts], the less [the] defendant need show in terms of unreasonableness.” *OMI Holdings, Inc. v. Royal Ins. Co.*, 149 F.3d 1086, 1092 (10th Cir. 1998) (citation omitted). And, “[w]hile not dispositive, the burden on the defendant litigating [a] case in a foreign forum is of primary concern in determining the reasonableness of personal jurisdiction.” *Id.* at 1096.

Rather than address this “final step” in its Response, the Division simply regurgitates its “purposeful availment” and “controlling person” arguments - neither of which has any merit. [Response at p. 9.] Indeed, the jurisdictional basis asserted by the Division, that Mr. Kelly “controlled” the Respondent Entities, is not only flawed, but completely false. Against this backdrop, the exercise of personal jurisdiction over Mr. Kelly would clearly not be fair or just.

III. MR. KELLY SHOULD BE DISMISSED FROM THIS ACTION BECAUSE THE DIVISION FAILED TO SERVE THE C&D ON HIM.

The Division attempted to serve Mr. Kelly by leaving a copy of the C&D, through a process server, with a woman by the name of “Erin,” at Respondent RHI Inc.’s business address in Indiana. [Response at p.3.] The Division claims that the Indiana address was the only address

Lease and dispute that the Universal Lease is a security. Notwithstanding this, Mr. Kelly is not an officer, director or employee of Respondent World Phantasy. Thus, he is not personally involved with the very aspect of the Universal Lease that allegedly makes it a security.

1 known that was reasonably calculated to give Mr. Kelly actual notice of the C&D. [*Id.* at p.4.]
2 Further, the Division contends that this was acceptable “substitute” service as RHI Inc. is
3 Mr. Kelly’s “usual place of business.” [*Id.*] The Division is wrong.

4 The Rules of Procedure for Investigations, Examinations, and Administrative Proceedings
5 establish the service requirements for a C&D issued by the Division. R14-4-307 applies to
6 “Temporary Orders” and provides that “[t]emporary cease-and-desist orders shall be served
7 pursuant to the provisions of R14-4-303.” R14-4-303, in turn, contains various provisions for
8 service upon individuals, service upon corporations or other entities, and service in a foreign
9 country.
10

11 With regard to service in a foreign country, R14-4-303(F) provides in pertinent part:

12 F. Service in a foreign country. When serving a subpoena, notice or temporary
13 cease-and-desist order in a foreign country, service shall be by any internationally
14 agreed means.

15 Here, Mexico is a signatory to the Hague Convention (as of June 1, 2000) and service must
16 be accomplished as provided for under that treaty. *See NSM Music, Inc. v. Villa Alvarez*, No. 02 C
17 6842, 2003 WL 685338, at *1 (N.D. Ill. Feb. 25, 2003). The Hague Convention does not permit,
18 as attempted here, personal service through a privately-retained process server. *Id.* “Rather, the
19 Hague Convention contemplates personal service via the authorities of the country of destination
20 [i.e., Mexico], or through the originating country’s [i.e., the United States’] consular officials in the
21 country of destination.” *Id.*

22 Notwithstanding this, the Division contends that “Mr. Kelly was served in the United
23 States” and that the “requirements for service of process in a foreign country do not apply where
24 service is made in the United States.” [Response at p. 3]. The Division cites, as an “example,”
25 *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 108 S.Ct. 2104, 2112 (1988).
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[The *Volkswagenwrek* Court held] that the Hague Convention does not apply to service on a foreign corporation through its domestic subsidiary irregardless [sic] of whether the subsidiary later forwards the documents abroad to its foreign principal.

First, contrary to the Division's self-serving proclamation, Mr. Kelly was not served in the United States. The C&D was left with "Erin," at RHI Inc. Second, there is nothing in the express language of R14-4-303, or the *Volkswagenwrek* decision, that supports the Division's strained position that it can circumvent the Hague Convention with Mr. Kelly – an individual and non-resident of this country.

Additionally, the Division is clearly familiar with, and has effected service through, the Hague Convention. (See, e.g., Docket No. S-3177-I, *In the Matter of: Forex Investment Services Corporation*.) The Respondents in *Forex* were actually served in Asia. The Division has not complied with the Hague Convention in this matter because it takes time and effort to do so. The Division was clearly more interested in hastily issuing the C&D than complying with an international treaty. As was obvious at the pre-hearing conference, the Division rushed to issue the C&D and rushed to leave a copy with a person named "Erin" in Indiana, approximately thousands of miles from where proper service could be effected.

The Division also wrongly claims it used adequate "substitute" service when it left the C&D with "Erin." [Response at p. 3.] R14-4-303(D) does authorize personal service "by leaving a copy with an agent authorized by express or implied appointment or by law to receive service of process for the individual upon whom service is being made." However, RHI Inc.'s office is not Mr. Kelly's "usual place of business or employment." [Kelly Dec. at ¶ 8.] Rather, Mr. Kelly has only been to the RHI Inc. facilities two or three times and he is not responsible for RHI Inc.'s day to day operation. [*Id.*]⁵ And, even though the Division contends the RHI Inc.'s address was the

⁵ In its Response, the Division argues that, because Mr. Kelly controls RHI Inc., it is necessarily his "usual place of business." [Response at p. 3.] However, there is nothing in R14-4-303(D) that supports this position or such a broad

only address known that "was reasonably calculated to give Mr. Kelly actual notice of C&D," this benign contention does not suggest or otherwise inform the Commission of the Division's effort, or lack thereof, to actually locate Mr. Kelly in Mexico. And, given the allegations in the C&D, it is inconceivable that the Division did not know that the Kellys are residents of Mexico. Finally, the use of substitute or alternative service is only proper if service is otherwise impractical and only upon the Commission's directive. *See* Ariz. R. Civ. P. 4.1(m).⁶ There is nothing in the record indicating the Commission directed the use of "substitute" service and the service of process in this matter was ineffective.⁷

IV. CONCLUSION.

The Division has failed to meet its burden of establishing personal jurisdiction over Mr. Kelly. Likewise, the Division has failed to properly serve the C&D on Mr. Kelly as required by the Administrative Rules. Consequently, the Commission must dismiss the C&D, as against Mr. Kelly.

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reading of the provision. Rather, on its face, R14-4-303(D) suggests that the individual being served must actually frequent the business on a regular basis. Because this is a service of process provision, any other interpretation, especially a broader one, would not make sense.

⁶ Pursuant to A.A.C. R14-3-101, "in all cases in which procedure is set forth neither by law, nor by these rules, nor by regulations or orders of the Commission, the Rules of Civil Procedure for the Superior Court of Arizona as established by the Supreme Court of the state of Arizona shall govern."

⁷ The Division also makes the unremarkable argument that the "purpose of process" was obviously accomplished because Mr. Kelly retained counsel and timely responded to the C&D. However, the mere fact that Mr. Kelly fortuitously learned of the C&D does not cure the improper service. *See Koven v. Saberdyne Systems Inc.*, 128 Ariz. 321, 625 P.2d 907, 911 (Ariz. App. 1981) ("proper service of process is essential for the court to have jurisdiction over [a party]"); *Stinson v. Johnson*, 3 Ariz.App. 320, 323, 414 P.2d 169, 171 (Ariz.App 1966) ("failure to comply with the statutes and rules concerning legal notice to (or service of process upon) the defendants of a pending lawsuit denies the court jurisdiction to enter judgment against the defendants in the matter, despite the fact of knowledge of the lawsuit on the part of defendants").

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1 RESPECTFULLY SUBMITTED this 30th day of July, 2003.

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3
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18 1200 West Washington Street
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20 COPY of the foregoing hand-delivered
21 this 30th day of July, 2003 to:

22 Marc E. Stern
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